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SUPREME COURT, U

IN THE

Supreme Court of the United States

October Term 1957

No. 9

HOWARD LAWN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

NOTICE OF MOTION, AFFIDAVIT AND BRIEF IN SUPPORT OF MOTION TO STRIKE.

MILTON POLLACK,
Counsel for Petitioner, Howard Lawn,
111 Broadway,
New York 6, N. Y.
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MOTION TO STRIKE NON-RECORD EVIDENCE AND ARGUMENT BASED THEREON IN THE GOVERNMENT'S BRIEF.

Petitioner, Howard Lawn, whose petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was granted on October 15, 1956, 352 U. S. 865 (1956) moves this Court for an order

a) striking from the Court's files and from the respondent's brief the non-record evidence supplied informally by respondent on or about September 30, 1957, and

b) striking from respondent's brief all argument based on such newly supplied non-record matter, and

(c) directing the respondent to file a corrected brief omitting said improper inclusions, references and arguments based upon said matters not-of-record in this case.

The petitioner further moves that the respondent be required to submit its brief and papers in opposition on or before October 7, 1957, and moves further that this motion be distributed to the Court within five (5) days from the date of filing hereof. The affidavit of Milton Pollack, counsel for petitioner Lawn, in support of this motion is annexed hereto.

Dated: New York, October 1, 1957.

MILTON POLLACK,
Counsel for Petitioner, Howard Lawn,
111 Broadway,
New York 6, N. Y.
Tel. No. WO 4-5770.

AFFIDAVIT OF MILTON POLLACK.

IN THE

Supreme Court of the United States

HOWARD LAWN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MILTON POLLACK, being duly sworn, deposes and says:

I am counsel for petitioner Lawn. Certiorari herein was granted on October 15, 1956, 352 U. S. 865 (1956).

This case is expected to be reached for argument on October 15, 1957.

I was retained in this matter in January 1956 and my knowledge and conduct of this matter are based on the record and proceedings had in the lower courts as shown by the record certified to this Court.

The respondent, in a sudden move made on or about September 30, 1957, has undertaken to file in this case with the Clerk of this Court, ten (10) copies of matter which respondent concedes is non-record "evidence". Then on the basis of this ex parte procedure and hearsay material, respondent has made an extensive argument in its brief to this Court filed on September 30, 1957. This argument is documented to such improper matter as well as other improper material described below. The "evidence" so utilized was not in any sense newly-discovered by the Government, nor does the Government so contend.

It is respectfully submitted that respondent's procedure is improper and not legally permissible and in violation of all rules and principles of appellate practice and the practice in this Court; and is distinctly unfair and prejudicial to the petitioner.

The respondent undertook on or about September 30, 1957 to file in this case, ten (10) copies of a claimed transcript of a so-called administrative hearing alleged to have been held 5½ years ago on May 12, 1952, in New Jersey. The respondent then set forth as an Appendix A and B, to respondent's brief on this appeal, alleged excerpts from said alleged transcript dated May 12, 1952 together with an alleged receipt dated May 15, 1952.

The respondent acknowledges in its brief at footnote 11 on page 28, that "The transcript of this hearing was *not introduced at the trial*" * * *. Respondent then observes that "We are confident that petitioner will not dispute the existence of the facts here set forth and believe they are relevant * * *" (Br. 28).

Again, on page 35 of respondent's brief herein the respondent identifies and makes reference to this newly supplied material and concedes that it is "not a part of the judicial record before this court" * * * etc.

Again, on page 41 of respondent's brief it states

> "In answer to his (petitioner's) serious charges of misconduct and prejudice *this brief*, in elaboration of the Government's offer of proof in the Court of Appeals, *refers to facts* known to petitioner Lawn which, though *not in this record*, we assume are undisputed." (Emphasis added.)

The petitioner seriously disputes both the accuracy of the alleged transcript and the accuracy of the alleged facts which the Government now wishes to "assume" on the basis of the new non-record "evidence."

The respondent aggravates the situation further in footnote 13 on page 42 of its brief by supplying further non-

record information, viz., that the Government had allegedly obtained a microfilm copy of the check in question from a bank, that it had forwarded the same to itself in Washington as an exhibit to a preliminary report of named revenue agents and that the report was sent from New York Intelligence to Washington Intelligence of the Internal Revenue Bureau. None of this supplied, hearsay and otherwise inadmissible information appears anywhere in the voluminous record of the proceedings had in this case in the courts below.

Months were spent in settling the record on the appeal herein and the new matter now brought forth on the verge of argument plainly was intended as a surprise move with which to influence the decision of this Court by matters which the Government must have known could not be taken into consideration.

Obviously, the attempt now to supply hearsay, unsworn non-record information and "evidence," not presented in the Courts below denies the rights of confrontation and cross-examination and impairs all constitutional guaranties by which to test the integrity and trustworthiness of the material, and seeks to preclude appropriate and timely inquiry into its origin, its accuracy, its probative force and its admissibility.

The proceedings and brief of the respondent are entirely irregular.

There is a regular procedure prescribed in the Supreme Court Rules for the inclusion of any material omitted from the printed record by error, or accident, or misstatement Rule 36(6). Since the newly supplied non-record "evidence" was not omitted from the certified printed record by error or by accident or by misstatement, but represents an entirely gratuitous proffer of unsworn hearsay not presented in any of the courts below or at any previous time revealed to petitioner's counsel, it is plain that the Government could not utilize Rule 36(6), and it has no alternative rights.

The respondent has "assumed" that the alleged substitute newly supplied non-record "evidence" which it has proffered to this Court through the means mentioned above removes

the plain illegality and unconstitutional use of Exhibits 61A-B placed by the Government in evidence in this case. The Government assumes that it can now come in with substitutes for the tainted Exhibits in evidence by submitting alleged substitutes in this irregular fashion and claiming that they were legally obtained and could have been used on the trial. The Solicitor General then proceeds to say that the use of and reference to such substitute "evidence" on appeal would not be unfair or prejudicial to the petitioner. This is a gross invasion of petitioner's rights.

Some indication may be made to this Court of the serious objections to the use in this case in its present posture of the newly supplied non-record "evidence" which the respondent now would rely upon in this Court.

1.—There are many issues of fact with respect to the legality of using the proposed substitute.

2.—The proposed substitute does not appear to have been furnished other than to the United States Attorney in New Jersey who was engaged in conducting Grand Jury proceedings. If this be the fact the deposit of the substitute with said United States Attorney rendered the substitute secret and unavailable constitutionally and otherwise to the New York prosecutor in this case.

3.—The time when the prosecutor should have come forth—if at all—with this newly supplied non record information as to the existence of the alleged substitute was before Judge Goddard in 1953 in the New York proceedings when Judge Goddard was considering whether he should outlaw the documents which became the tainted Exhibits 61A-B in evidence on the trial. It was incumbent on the Government at that time to object to outlawry of these documents on the ground, now irregularly presented, that the Government had independently obtained, through innocent means, the substitutes now proffered to this Court. The Government did not do so. It was therefore irrevocably bound not to use at any

time the presently proffered substitutes since Judge Goddard had outlawed the use of the check and the check stub involved because they were obtained in violation of constitutional right against self-incrimination. Any proffer of the substitutes at the hearing before Judge Goddard would necessarily have allowed the petitioner then the opportunity of confrontation, cross-examination and a test of the legality of the use of the presently proffered substitutes.

4. The accuracy of the newly supplied "New Jersey transcript is challenged by the petitioner and this clearly raises issues of fact; it appears erroneous on its face and bears interpolations supplied by the typist or someone else. The internal evidence that the "transcript" is a hodge-podge of confusion plainly challenges the integrity of the "transcript."

To give any consideration on this appeal to the newly supplied non-record "evidence" and to the respondent's assumptions therefrom would be to open a veritable Pandora's box of matters outside the record of the proceedings in the lower courts which is the subject matter that this Court is called upon to review. It would be grossly unfair to petitioner to confront him at the last minute on the appeal with an attempted use of newly supplied non-record "evidence." It would be plainly prejudicial to infuse into the record the hearsay now proposed and to attempt to determine petitioner's liberty on the speculations inherent in the newly supplied non-record matter.

On Saturday, September 28, 1957, we were furnished with an uncorrected page proof of the respondent's brief. We were advised by the Clerk that the final print of the brief was filed on Monday, September 30, 1957. At the time of the preparation of this affidavit we had not as yet received a copy of the final print. Our first knowledge of the Government's course and of the subject matter thereof was on September 28, 1957. I never previously had been apprised of the meeting of May 12, 1952 or of the "transcript" now pro-

sented. We are making this motion at the earliest possible moment and requesting that the disposition of this matter be accelerated so that we may be guided by the Court's ruling hereon prior to submission of our reply brief, if possible, or prior to the argument of the appeal which now has been set for October 15, 1957. We are not requesting any postponement of the argument of the appeal.

Annexed as a schedule hereto are citations to the arguments or references in respondent's brief* utilizing the non-record "evidence" and the non-record "transcript" of the non-record alleged proceedings of May 12, 1952 and May 15, 1952.

MILTON POLLACK.

Sworn to before me this
1st day of October, 1957.

TESS M. GREENFIELD,

Notary Public, State of New York,
No. 24-1560200,
Qualified in Kings County.
Commission Expires March 30, 1959.

SCHEDULE* TO FOREGOING AFFIDAVIT.

1.—Appendix A (br., pp. 72-76).

2.—Appendix B (br., p. 77).

3.—Page 28, footnote 11.

4.—Pages 28-9, paragraph beginning "On May 12, 1952" etc. and ending before the first full paragraph on page 29.

5.—Page 30, sentence reading "One of these checks and the stub are the documents of which he had given the Government copies in May 1952."

6.—Page 35, paragraph numbered 1 thereon.

7.—Page 41, beginning with the last sentence of the second paragraph going through the balance of page 41 and all of page 42 and through the first three lines of page 43 including footnotes 12 and 13 on page 42.

8.—Page 50, footnote 15.

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* All references are to the uncorrected page proofs of the Government's brief which references presumably are in the final print filed September 30, 1957 in substance.

IN THE

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Respondent.

BRIEF IN SUPPORT OF FOREGOING MOTION.

This Court has resolutely refused to permit the introduction before it of material not properly admitted in evidence in the courts below and not properly certified to it.

Hopt v. *Utah*, 114 U. S. 488 (1885): "* * * the duty of seeing that the record contains everything that actually took place, necessary to support the conviction, is the duty of the district attorney. * * * the affidavit taken since the entry of the case in this court cannot be considered. The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record, made up and transmitted as required by law, of what was done in his presence at the trial in open court * * *."

Hooey v. *Wilson*, 9 Wall. 501 (U. S. 1870): "We do not consider the supplement to the record filed in this court as before us. It was not in the case in the court below. To recognize it here would involve the exercise of original instead of appellate jurisdiction."

Pacific R.R. of Missouri v. *Ketchum*, 101 U. S. 289 (1880): "We take a case on appeal as it comes to us in the record, and receive no new evidence."

McClellan v. *Carland*, 217 U. S. 268 (1910): "We shall not enter upon a consideration of these papers, because they are not in the record, as the same has been certified to us * * *. We must take the case as it is presented here upon the stipulated return to the writ of certiorari on the record as presented to the circuit court of appeals."

Clark v. *Pennsylvania*, 128 U. S. 395 (1888): "We act only upon the record of the court below * * *."

South Carolina v. *Wesley*, 155 U. S. 542 (1895): "* * * reference cannot properly be had to a transcript of the record in a case pending in another court to supply defects in the record of a case in this court."

See also *Stern & Gressman*, Supreme Court Practice 304 n. 4 (2d ed. 1954).

The introduction of matters not of record merits the rebuke which this Court administered in *Schley* v. *Pullman's Palace Car Co.*, 120 U. S. 575 (1887):

> "Before entering upon the consideration of the case it is proper to notice the motion made in behalf of the plaintiff in error, to strike out certain parts of the printed argument filed by the counsel for the defendant in error. Notwithstanding the agreement that the case should be heard in the court below upon the single question referred to in the stipulation, the counsel for the defendant in error states many things, which he declares to be 'incontrovertible facts,' and within the knowledge of opposing counsel, but which are wholly unsustained by anything in the record. The motion to strike out relates to those matters. The excuse given for this breach of professional propriety is 'the extreme brevity of the record.' But it is the same record upon which counsel for the Company succeeded for his client, and which, by agreement, contained all that was to be submitted to the court. The excuse given furnishes no apology whatever for his violation of the terms of the stipulation;

much less does it palliate his attempt to influence the decision here, by reference to matters not in the record and which he must have known could not be taken into consideration. It is only necessary to say that the facts *dehors* the record, which have been improperly introduced into the brief of the counsel for the defendant in error, have not in any degree influenced our determination of the case."

Non-record "evidence" cannot determine the issues on an appeal to this Court or be considered and we submit that it was improper to utilize the same in a brief filed with this Court.

Respectfully submitted,

MILTON POLLACK,
Counsel for Petitioner, Howard Lawn.